

STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

Docket No. 2015-02

RE: Application of Antrim Wind, LLC for Certificate of site and)
facility to construct a wind electric generation in the town of Antrim,)
Hillsborough County, New Hampshire and operate the same)

**OBJECTION OF THE WIND ACTION GROUP TO APPLICANT’S PARTIALLY
ASSENTED-TO MOTION FOR PROTECTIVE ORDER AND CONFIDENTIAL TREATMENT**

A. Background

Intervenors in this Docket propounded written data requests to Antrim Wind, LLC (“AWE” or “Applicant”) by March 28, 2016. This was followed by timely responses distributed by the Applicant on April 11, 2016, including responses to Counsel for the Public’s request for Project pro formas, plant construction agreements and costs, letters of intent or other agreements between AWE and financial/lending institutions, and details relating to Turbine Supply, Service and Maintenance Agreements, and sale of the Project’s output (collectively the “Documents”).

According to the Windaction Group’s knowledge and belief, none of the Documents were provided as part of AWE’s application or February 19, 2016 supplemental filing with the Site Evaluation Committee (“SEC” or “Committee”), even in a redacted form. We are also unaware of any testimony in the Docket’s record that was prepared by, or on behalf of AWE, that explains the Documents. It was only through the discovery process that AWE chose to make the Documents available despite the apparent requirements of NH Site 301.04 (a)(3) and NH Site 301.04 (a)(5) obligating an applicant to provide the “financing plan for the proposed facility, including the amounts and sources of funds required for the construction and operation of the proposed facility” and “Current and pro forma statements of assets and

liabilities.” Footnote 1 of AWE’s motion makes clear AWE is unwilling to provide the same Documents to other parties. The Windaction Group (“Windaction”) propounded similar data requests on the Applicant but was frustrated by AWE’s refusal to make the documents available.¹

For the reasons stated below, the Windaction Group opposes the Motion and respectfully asks the Committee to deny the Motion, or in the alternative, compel AWE to provide the Documents to the parties seeking access under appropriate and reasonable non-disclosure terms.

B. Discussion

a. Motion is Premature

The Applicant supplied the Documents in response to a data request propounded by Counsel for the Public. Pursuant to NH Site 202.12 (g) “Responses to data requests and objections to data requests shall not be filed with the committee or subcommittee.” No formal action has been taken by the Applicant or Counsel for the Public to move the Documents into the Docket’s record. The motion should be rejected as premature.

b. Right To Know

Should the Presiding Officer or the Chairman choose to rule on the merits of AWE’s motion, Windaction asks that the Motion be denied under the Right to Know Law.

The State of New Hampshire's Right to Know Law, RSA 91-A, was enacted to "increase public access to governmental proceedings in order to augment popular control of government and to encourage agency responsibility." *Society for the Protection of NH Forests v. Water Supply & Pollution Control Commission*, 115 N.H. 192, 194 (1975) The Act generally provides that the public has the right to inspect

¹ Attorney Needleman, Attorney Iacopino and Windaction’s Lisa Linowes met by phone to discuss the possible disclosure of the Documents. AWE was unwilling to release the Documents to The Windaction Group even under reasonable non-disclosure terms.

all Governmental records in the possession, custody or control of a public body or agency. RSA 91-A:5
Further, NH Rule Site 104.01(b) empowers the presiding officer or chairperson to determine whether
certain documents are exempt from disclosure.

AWE asserts that RSA 91-A:5 entitles it to confidential protection of “confidential, commercial,
or financial information ...and other files whose disclosure would constitute invasion of privacy.” RSA
91-A:5, IV “Whether information is exempt from disclosure because it is private is judged by an
objective standard and not by a party’s subjective expectations.” *Lamay*, 152 N.H. at 109 In addition,
AWE’s motion is overly broad in that it seeks blanket exemption for *the entirety* of each Document
without considering that portions of the Documents might not meet an objective standard. There is no
indication that AWE made any effort to prepare even redacted versions of the Documents, particularly of
those Documents containing information required under NH Site 301.04 (a)(3) and NH Site 301.04 (a)(5).

The Right to Know law does not exempt information from public disclosure on a *per se* basis.
Rather, the Committee must perform a balancing test to determine whether the Documents, in part or in
whole, should be protected or if the public’s interest in disclosure outweighs AWE’s interest. *Order
Partially Asserted to Motion for Protective Order and Confidential Treatment for Certain Confidential,
Commercial and Financial Documents, Application of Laidlaw Berlin BioPower LLC, NH SEC Docket
No. 2009-02 (June 9, 2010)*

“The party resisting disclosure bears a heavy burden to shift the balance towards nondisclosure.
Lamy v. New Hampshire Public Utilities Commission (2005) To overcome this presumption, a party
requiring secrecy must be able to show “some overriding consideration or special circumstance,
that is, a sufficiently compelling interest.” *In re Keene Sentinel*, 136 N.H. 121, 130 (1992). The
content of the Documents obviously goes beyond “information about private citizens that is
accumulated in various governmental files but that reveals little or nothing about an agency's

own conduct.” *Union Leader Corp. v. City of Nashua*, 141 N.H. 473, 477 (1996) In fact, the Documents likely reveal essential information already required by the Committee pursuant to NH Site 301.04 (a)(3) and NH Site 301.04 (a)(5) and on which the Committee will rely in determining financial capability. *See* RSA 162-H:16 IV(b), RSA 162-H:16 IV(e) and NH Site 301.13(a) Yet, in its motion, AWE makes little attempt to address the public’s interest in disclosure² and focuses narrowly on how the public’s interest is “dramatically outweighed by the privacy interests of the Applicant.” *AWE Motion at 4*

“The obvious public purpose that may be served by disclosure of the disputed exhibits is to increase public knowledge about how the authority operates.” *Union Leader Corp. v. New Hampshire Hous. Fin. Auth.*, 142 N.H. 540 (1997). Disclosure is warranted if it serves “the purpose of informing the citizenry about the activities of their government.” *Union Leader Corp. v. City of Nashua*, 141 N.H. 473, 477 (1996)

While Counsel for the Public holds a special statutory role under RSA 162-H:10, V to conduct “reasonable studies and investigations,” such investigations generally result in the information being publicly disclosed and argued in open hearings. If AWE’s motion is granted, access to the Documents will be limited to the Committee and Counsel for the Public, both government entities. Thus, the Committee and Counsel for the Public will hold sole and exclusive authority over the finding of facts and formal deliberations relating to the current and future financial condition of AWE and the project. Ultimately, the Committee will determine financial capability, a significant finding of the process, entirely behind closed doors. Such an outcome where the public is barred from access, is directly counter to the intent of the Right to

² AWE has provided the parties with what it called a *Public Pro Forma* outlining a 20-year projection of project revenues, expenses etc. This document is little more than a superficial outline of what any 28.8 MW wind project in New England might look like.

Know Law and obstructs the public's ability to gain insight and increased knowledge of the government's conduct. Given the intensity of public focus on the Committee's actions in recent years, it is incumbent upon the Committee to ascribe high importance to the public's right to have access to this critical information.

c. Due Process

If the Presiding Officer is unwilling to grant public access to the Documents, due process rights require that the Documents be provided to the parties under appropriate and reasonable non-disclosure terms.

The right to be heard is an "an essential requisite of due process." *Provencal v Provencal* 122 N.H. 793 (1982) Such right "includes the right to cross examine adverse witnesses." *Ross v. Gadwah*, 131 N.H. 391, 395 (1988). As a matter of due process the "opportunity for cross examination is guaranteed" to parties in administrative proceedings. *In re Sprague*, 132 N.H. 250, 258 (1989). *See also* RSA 541-A:33, IV and RSA 541-A:31, IV While it may be appropriate to impose reasonable limits to cross examination in administrative proceedings, it is not within the power of the Presiding Officer to deprive a party of the opportunity altogether. *See id.*

A party's rights of due process "mandate that they have an opportunity to counter evidence that a fact-finder will rely on in reaching a judgment." *Ross*, 131 N.H. at 395; *see Desclos v. Southern N.H. Med. Ctr.*, 153 N.H. 607, 618-19 (2006) (privileged information must be disclosed in order to provide fair trial to party). Since, in prior proceedings, information essential for the Applicant to meet its burden of showing financial capability was shared with non-competitor intervenor parties who agreed to sign confidentiality agreements, objectively, it would appear that sharing of the information will not be as damaging as AWE asserts. *See*

Order, dated Oct 17, 2006, at 2, Application of Community Energy Inc and Lempster Wind, LLC, SEC no. 2006-01; Order, dated Dec. 8, 2008, at 2-3, Application of Granite Reliable, SEC no. 2008-04; Order, dated June 9, 2010, Application of Laidlaw Berlin Biopower, SEC no. 2009-02 (allowing party access to confidential information on agreement not to disclose).

The “public’s” interest in this information is high. However, the interest of the parties to the information is even higher. None of the parties to this proceeding are competitors of the Applicant, and the Applicant has not made any allegation that any party is untrustworthy or unable to honor a confidentiality agreement. There is no basis to claim that if the Documents are shared with intervenor parties that those parties will violate confidentiality agreements.

Finally, in footnote 1 of the Applicant’s motion, the Applicant argues that the Committee’s ruling with respect to access business information in Docket 2012-01 applies in this proceeding. *See Order on Outstanding Motions, Docket No. 2012-01, p. 4 (August 22, 2012)* However, the facts in 2012 are the not the same as they are today. In 2012, Counsel for the Public sought leave to retain an expert consultant to assess the Applicant's financial and managerial capability. Counsel for the Public for this docket has not taken any steps to secure the services of an outside consultant, nor has she made any public statements regarding how the Documents might be used or whether the information will even be used. If the motion is granted, the Documents could remain off-limits from public access with no parties able to conduct a full cross-examination. This would be entirely counter to the intent of RSA 162-H “that all entities planning to construct facilities in the state be required to provide full and complete disclosure to the public of such plans.” Recognizing that Counsel for the Public represents all of the public, other intervenors in this Docket may have very different ideas for making their case before the

Committee. The due process rights of the other parties should not rely on the actions of Counsel for the Public as it relates to the Documents.

C. Conclusion

WHEREFORE, in view of the foregoing, Windaction respectfully requests that the Committee deny the Applicant's motion for protective order and confidential treatment as premature and counter to NH's Right to Know Law. In the alternative, Windaction asks that the Committee grant other parties access to the Documents and that AWE disclose the Documents under appropriate and reasonable non-disclosure terms.

Dated this day of April 25, 2016

THE WIND ACTION GROUP



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cc: Parties to Docket 2015-02